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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOEL ANDREWS,

Plaintiff and Appellant,

v.

POMONA VALLEY HOSPITAL
MEDICAL CENTER,

Defendant and Respondent.

B231497

(Los Angeles County
Super. Ct. No. KC056171)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dan Thomas Oki, Judge. Affirmed.

Joel Andrews, in pro. per.; and Paul Taylor Smith for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, L. Susan Snipes and Judith M. Tishkoff for Defendant and Respondent.

Plaintiff Joel Andrews brought this elder abuse action against several medical centers and physicians in his capacity as the successor-in-interest of his deceased mother, Enid Andrews. Plaintiff appeals from a judgment entered after the trial court granted the summary judgment motion of Pomona Valley Hospital Medical Center (Pomona Valley). He contends that the trial court abused its discretion in denying his oral request for a continuance of the summary judgment motion, made two weeks after the trial court granted his attorney's motion to be relieved as counsel and nine days before the hearing on the summary judgment motion. He also contends that Pomona Valley did not satisfy its burden on summary judgment and the court therefore erred in granting the motion. Plaintiff did not file an opposition to the summary judgment motion. Finding no error, we affirm.

BACKGROUND¹

Plaintiff's mother, Enid Andrews, resided at Gladstone Care and Rehabilitation Center for most of the time between 2001 and 2007. In February 2007, she was transferred to East Valley Hospital Medical Center. "At the time of her transfer to East Valley Hospital, Ms. Andrews had a long history of medical problems, including a meningioma or brain tumor, hydrocephalus, chronic obstructive pulmonary disease, pulmonary congestion, congestive heart failure, cardiomegaly, chronically low albumin levels, dementia, hypertension, renal insufficiency, a history of urinary tract infections and other infectious diseases including colonization of herpes zoster, scabies and MRSA, altered mental status and chronic rashes."

Upon her admission to East Valley Hospital, Ms. Andrews tested positive for MRSA and "a diffuse body rash." She was treated with intravenous antibiotics. Ms. Andrews also was diagnosed with and treated for herpes zoster of the facial nerve. While at East Valley Hospital, Ms. Andrews had a tube placed for feeding. "[H]er overall

¹ The facts about Enid Andrews's health and medical care are taken from the declaration of Pomona Valley's expert witness, Robert Goodman, M.D., submitted in connection with Pomona Valley's motion for summary judgment.

prognosis was very poor. Ms. Andrews was considered to be a candidate for hospice care, which means her life expectancy was considered to be six (6) months or less.”

On March 19, 2007, Ms. Andrews, who was then 89 years old, was transferred to Pomona Valley “for the purpose of having brain surgery.” She was on a ventilator and was using a feeding tube. “[S]he was in end-stage renal failure and required dialysis throughout the remainder of her hospitalization.” On March 21, 2007, Ms. Andrews “underwent a craniotomy with resection of the right middle fossa brain tumor.” She never regained consciousness after the brain surgery and she “remained ventilator dependent for the duration of her hospitalization at Pomona Valley. . . .” Ms. Andrews died at Pomona Valley on August 7, 2007, after suffering an “acute cardiopulmonary arrest.”

In July 2009, Plaintiff, in his capacity as the successor-in-interest of Ms. Andrews, filed this action against defendants Gladstone Care and Rehabilitation Center, East Valley Hospital Medical Center, Pomona Valley and two physicians.² In both his original complaint, and his first amended complaint filed in October 2009, Plaintiff asserted one cause of action against each of the defendants for “Reckless and Willful Neglect – Elder Abuse.”

Plaintiff’s first amended complaint alleges that Pomona Valley neglected Ms. Andrews “by failing to assist [her] in personal hygiene, and/or to provide medical care for her physical needs, and/or to protect her from health and safety hazards.” Plaintiff asserts that Pomona Valley failed to prevent or cure “rashes, pressure sores and other sores and tears on [Ms. Andrews’s] skin;” failed to prevent Ms. Andrews “from contracting institutionally spread diseases such as herpes zoster, scabies, UTI, MRSA, C-diff and pneumonia;” permitted Ms. Andrews “to remain in dirty, unhealthy surroundings and to lie in urine and feces;” failed to provide Ms. Andrews “with simple

² By December 2010, when the trial court heard Pomona Valley’s summary judgment motion, Plaintiff had dismissed East Valley Hospital Medical Center and the two physicians from the action, and had been having settlement discussions with Gladstone Care and Rehabilitation Center.

care such as cutting toe and finger nails, allowing same to become impacted and infected;” restrained her arms and/or legs “for extended periods of time although such restraint was unnecessary to care for her and harmful to her physical and mental well-being;” and intentionally refused or recklessly failed to act as Ms. Andrews’s “health advocate.”³ Plaintiff alleges that this neglect proximately caused injuries and damages to Ms. Andrews. Plaintiff seeks punitive damages for Pomona Valley’s alleged intentional, oppressive or reckless conduct. Plaintiff also seeks attorney fees and costs, and damages for Ms. Andrews’s pain and suffering, under Welfare and Institutions Code section 15657, based on these allegations of oppressive or reckless conduct.

In October 2009, Pomona Valley filed an answer to the first amended complaint asserting numerous affirmative defenses. On September 30, 2010, Pomona Valley filed its motion for summary judgment. The hearing was set for December 17, 2010. Pomona Valley argued that Plaintiff cannot prove a cause of action for “Reckless and Willful Neglect – Elder Abuse,” under Welfare and Institutions Code section 15657, because Plaintiff cannot show that Pomona Valley acted with recklessness, oppression, malice or fraud. Pomona Valley asserted that the evidence establishes that the care and treatment it provided to Ms. Andrews “was appropriate and within the applicable standard of care.” Pomona Valley also argued that Plaintiff cannot establish that Pomona Valley caused any injury to Ms. Andrews.

In connection with its summary judgment motion, Pomona Valley submitted the declaration of Robert Goodman, M.D., a board-certified doctor specializing in internal medicine. The declaration sets forth Dr. Goodman’s background, training and experience. It also states that he reviewed Ms. Andrews’s medical records from Pomona Valley and East Valley Hospital, and portions of her medical records from Gladstone Care and Rehabilitation Center and Foothill Presbyterian Hospital. Dr. Goodman also reviewed two volumes of transcripts from Plaintiff’s deposition.

³ Plaintiff is not alleging that Pomona Valley negligently or recklessly performed brain surgery on Ms. Andrews. According to Dr. Goodman, the medical records show that Pomona Valley performed the brain surgery “at the insistence of” Plaintiff.

Dr. Goodman's declaration states that during Ms. Andrews's hospitalization at Pomona Valley, "she was seen in consultation by neurosurgery, pulmonology, nephrology, infectious disease, neurology and podiatry." She had multiple tests for MRSA and all were negative. "She had one positive test for C-Diff^[4] [but] the remainder of eleven tests for the condition were all negative." Ms. Andrews was treated for scabies^[5] and the condition "cleared up promptly." Based on his review of the medical records, which detail Ms. Andrews's "long history of scabies and other rashes," Dr. Goodman opined "to a reasonable degree of medical probability that [Ms. Andrews] contracted scabies prior to coming to Pomona Valley Hospital Medical Center." Ms. Andrews also was treated for urinary tract infections while at Pomona Valley. Dr. Goodman explained that Ms. Andrews "had been colonized with these infections prior to her admission at Pomona Valley" and had been treated for urinary tract infections while at East Valley Hospital. Recurrences of these infections were likely "due to Ms. Andrews' diminished health and immuno-suppressed state."

Dr. Goodman explained in his declaration that Ms. Andrews's treating physician requested that Ms. Andrews have a podiatric consultation for ingrown toenails. "Treating toe nails of a severely compromised patient such as Ms. Andrews would not be a nursing function." On two occasions, a podiatrist trimmed her toenails. "No further treatment of this condition was deemed to be necessary by the physicians providing care to [her]." "There is no indication in the medical records that her fingernails were not trimmed or that lack of trimming caused a problem."

⁴ The Mayo Clinic defines C. difficile or C. diff, in pertinent part, as "a bacterium that can cause symptoms ranging from diarrhea to life-threatening inflammation of the colon. Illness from C. difficile most commonly affects older adults in hospitals or in long term care facilities and typically occurs after use of antibiotic medications." (<http://www.mayoclinic.com/health/c-difficile/DS00736>, last viewed 6/20/12.)

⁵ The Mayo Clinic defines scabies, in pertinent part, as "an itchy skin condition caused by a tiny burrowing mite called *Sarcoptes scabiei*." (<http://www.mayoclinic.com/health/scabies/DS00451>, last viewed 6/20/12.) "Scabies is contagious and can spread quickly through close physical contact in a family, child care group, school class or nursing home." (*Ibid.*)

Dr. Goodman also stated in his declaration that, throughout her hospitalization at Pomona Valley, “Ms. Andrews was placed on a special bed designed to alleviate skin breakdown.” “The nursing staff documented repeated repositioning of the patient. Despite these efforts, Ms. Andrews developed decubitus ulcers^[6] during her lengthy hospital stay.” Ms. Andrews received “excellent medical care for the decubitus ulcers.” Dr. Goodman opined that Ms. Andrews developed decubitus ulcers “due to her declining medical status” and “not as a result of any negligent medical care” at Pomona Valley.

Based on his background, training and experience and his review of the medical records, Dr. Goodman opined “that the totality of the care provided to Ms. Andrews during her nearly five month hospitalization at Pomona Valley was appropriate and within the applicable standard of care. Specifically, there is ample evidence in the records that the staff at Pomona Valley continuously monitored Ms. Andrews’ declining health conditions on a twenty-four-hour-a-day basis and provided her with all appropriate and indicated care. The staff regularly assessed the needs of Ms. Andrews and initiated appropriate interventions as her health needs dictated. The staff also communicated all significant changes in Ms. Andrews’ condition to her family and physicians, and carried out the physicians’ orders in a timely and appropriate manner.^[7] Of the 141 days Ms. Andrews spent as a patient at Pomona Valley Hospital, 63.3 days were spent in the Intensive Care Unit where she received no less than 1:2 care by registered nurses. The remainder of her time was spent in a telemetry/step down intensive care unit where she was continuously monitored and received no less than 1:4 care. She was accordingly never neglected or abandoned by the staff at Pomona Valley Hospital Medical Center.”

Dr. Goodman also opined “that the staff of Pomona Valley Hospital did not act negligently, recklessly, despicably, outrageously, maliciously or oppressively in treating

⁶ Decubitus ulcers, commonly referred to as “bedsores” or “pressure sores,” are “injuries to skin and underlying tissues that result from prolonged pressure on the skin.” (<http://www.mayoclinic.com/health/bedsore/DS00570>, last viewed 6/20/12.)

⁷ Dr. Goodman stated that Ms. Andrews’ treating physician decided that Ms. Andrews should be restrained, and the staff carried out the physician’s orders.

Ms. Andrews.” “To a reasonable degree of medical probability, nothing the staff at Pomona Valley Hospital did or failed to do contributed to or caused any damage to Enid Andrews.”

On October 29, 2010, Plaintiff’s attorney filed a motion to be relieved as counsel. Plaintiff did not file an opposition to the motion. On November 23, 2010, the trial court held a hearing on the motion. The court conferred with Plaintiff’s attorney in chambers and off the record, and then granted the motion. Plaintiff informed the court that he had spoken with 10 to 15 attorneys, but none of them believed there was enough time before the December 17, 2010 hearing on the summary judgment motion and the February 1, 2011 trial “to do the work.”

Plaintiff did not file an opposition to Pomona Valley’s motion for summary judgment. On December 8, 2010, nine days before the hearing on that motion, the parties appeared in court and Plaintiff orally requested that the trial court continue the hearing on the summary judgment motion and the trial date to allow him additional time to retain counsel. Plaintiff informed the court that one of the attorneys he had spoken with expressed interest in his case, but also stated that he did not have enough time to prepare for the hearing on the summary judgment motion. Plaintiff also told the court that he had only recently received the case file, on December 3, 2010. Finally, Plaintiff indicated that he could not represent himself because he was disabled, lived on a fixed income and had very limited resources. Pomona Valley’s counsel objected to any continuance.

The trial court denied Plaintiff’s request for a continuance, stating that the request needed to be in the form of a written motion, filed at least 14 days before the hearing on the summary judgment motion. Plaintiff made an oral request nine days before the hearing. The court also stated that Plaintiff had not made the requisite showing under Code of Civil Procedure section 437c that evidence in opposition to the motion might exist but could not be obtained by the date the opposition was due. (Code Civ. Proc., § 437c, subd. (h).) The court explained to Plaintiff: “If you have an attorney who is willing to take the case if given more time, and that attorney wishes to enter what’s called a ‘special appearance’ for the purpose of seeking a continuance, I will discuss the matter

with counsel, including your new proposed attorney. [¶] In other words, if they are willing to make a request to continue without committing prior to the granting of a continuance to taking the case, I will allow them to make that appearance so that I can talk to the attorney about it. But I can't grant your oral request now, especially as to the motion for summary judgment."

The hearing on Pomona Valley's summary judgment motion went forward on December 17, 2010. Plaintiff told the trial court that he had contacted 13 attorneys and they all told him that they would not be able to represent him until the dates were continued. Plaintiff also stated that he had conveyed to the prospective attorneys what the court had told him at the last hearing about an attorney making a special appearance to request a continuance. Plaintiff added, "I cannot force them [the prospective attorneys] to come in." Plaintiff did not present any argument in opposition to summary judgment.

The trial court granted the summary judgment motion, adopting its tentative ruling as its final ruling. The court found that Dr. Goodman was "qualified to review the records relevant to this action, identify facts, and provide opinions thereon." The court summarized Dr. Goodman's opinions: "Based upon his review of the records, Dr. Goodman opines that the totality of the care provided to Ms. Andre[w]s during her nearly five-month hospitalization in Pomona Valley was appropriate and within the applicable standard of care and that she was never neglected or abandoned by the staff of Pomona Valley [citation]; the staff of Pomona Valley did not act negligently, recklessly, despicably, outrageously, maliciously or oppressively in treating Ms. Andrews [citation]; and that nothing the staff at Pomona Valley did or failed to do contributed or caused any damages to Ms. Andrews." The court concluded that Pomona Valley met its initial burden on summary judgment. The court explained: "The burden then shifts to plaintiff to submit evidence demonstrating a triable issue of material fact. Plaintiff did not file an opposition. Thus, the motion for summary judgment is granted."

DISCUSSION

Request to Continue Summary Judgment Motion

Plaintiff contends that the trial court abused its discretion in denying his request to continue the summary judgment motion. He argues that such “continuances are virtually mandated” under Code of Civil Procedure section 437c, subdivision (h), and case law interpreting that provision. (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34-35 [under section 437c, subdivision (h), “[w]here the opposing party submits an adequate affidavit showing that essential facts may exist but cannot be presented timely, the court must either deny summary judgment or grant a continuance”; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633 [same].) The flaw in Plaintiff’s argument is that he did not comply with that statutory provision, which requires that a written application be filed by the date the opposition to the summary judgment motion is due (14 days before the hearing), based on a showing “that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented.” (Code Civ. Proc., § 437c, subd. (h).) Here, Plaintiff made an oral request, nine days before the hearing, and he did not make or even attempt to make the requisite showing under Code of Civil Procedure section 437c, subdivision (h).

On October 29, 2010, more than a month before the opposition to the summary judgment motion was due, Plaintiff’s attorney filed a motion to be relieved as counsel. Plaintiff appeared in court on November 23, 2010, where the trial court granted his attorney’s motion to be relieved. By December 3, 2010, the date the opposition to the summary judgment motion was due, Plaintiff had not filed either an opposition or an application to continue the summary judgment motion. He waited until December 8, 2010, nine days before the hearing on the summary judgment motion, to make his oral request for a continuance. He did not make a showing that he would be able to retain counsel even if the court did grant the continuance. He represented that one of the 13 attorneys he had spoken with had expressed interest in the case. The trial court explained to him that it would entertain a continuance request made by an attorney who was contemplating taking the case. No such continuance request was made.

Based on these facts, we cannot find that the trial court abused its discretion in denying Plaintiff's belated oral request for a continuance of the summary judgment motion. (*Frazee v. Seely, supra*, 95 Cal.App.4th at p. 633 ["The decision whether to grant such a continuance [of a summary judgment motion] is within the discretion of the trial court".])

Motion for Summary Judgment

A trial court should grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant may establish its right to summary judgment by showing that one or more elements of each cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has satisfied its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to each cause of action. (*Ibid.*) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "[T]o defeat the motion for summary judgment, the plaintiff must show ""specific facts,"" and cannot rely upon the allegations of the pleadings." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.)

We review the trial court's ruling on a motion for summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) "[W]e are not bound by the trial court's stated reasons or rationales." (*Horn v. Cushman & Wakefield Western, Inc., supra*, 72 Cal.App.4th at p. 805.)

Plaintiff asserted one cause of action against Pomona Valley, which he labeled "Reckless and Willful Neglect – Elder Abuse." He argues on appeal that he can prove a cause of action under the Elder Abuse and Adult Civil Protection Act (Elder Abuse Act). (Welf. & Inst. Code, § 15600 et seq.) The Welfare and Institutions Code defines neglect in this context as "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in like

position would exercise.” (Welf. & Inst. Code, § 15610.57, subd. (a)(1).) Under this statute, neglect includes, but is not limited to: (1) “[f]ailure to assist in personal hygiene, or in the provision of food, clothing, or shelter;” (2) “[f]ailure to provide medical care for physical and mental health needs;” (3) “[f]ailure to protect from health and safety hazards;” and (4) “[f]ailure to prevent malnutrition or dehydration.” (Welf. & Inst. Code, § 15610.57, subd. (b)(1)-(4).)

Under the Elder Abuse Act, a plaintiff may recover attorney fees and costs, and damages for the decedent’s pain and suffering, if the plaintiff proves by clear and convincing evidence that the defendant is liable for neglect, and also that “the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of” the neglect. (Welf. & Inst. Code, § 15657.) The plaintiff also must prove “that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering.” (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 407.) In this case, Plaintiff alleges that Pomona Valley neglected Ms. Andrews and engaged in oppressive or reckless conduct, entitling Plaintiff to the remedies available under Welfare and Institutions Code section 15657.

Plaintiff contends that Pomona Valley failed to meet its burden on summary judgment. We disagree. Through the declaration of Dr. Goodman, Pomona Valley presented evidence establishing (1) that Pomona Valley provided appropriate care to Ms. Andrews, (2) that Pomona Valley did not neglect Ms. Andrews, and (3) that Pomona Valley did not do or fail to do anything which caused or contributed to any injury to Ms. Andrews. Pomona Valley demonstrated in its moving papers that it did not act negligently, recklessly, oppressively or maliciously. Thus, Pomona Valley established that Plaintiff cannot prove his cause of action for elder abuse.

Plaintiff asserts that he may prove a cause of action under the Elder Abuse Act based on a showing of negligence, as opposed to a showing of recklessness, oppression, fraud or malice. Case law holds otherwise. (See, e.g., *Carter v. Prime Healthcare Paradise Valley LLC*, *supra*, 198 Cal.App.4th at p. 408 [“absent specific factual allegations indicating at least recklessness (i.e., a conscious or deliberate disregard of a

high probability of injury),” neither the failure to infuse the proper antibiotics nor the failure to locate the proper size endotracheal tube “constitutes abuse or neglect within the meaning of the Elder Abuse Act”], citing cases.) Even if Plaintiff had stated a cause of action for negligence—which he did not—Pomona Valley has established that Plaintiff cannot prove a cause of action for negligence. As set forth above, Pomona Valley argued and presented evidence demonstrating that Pomona Valley did not act negligently in treating and caring for Ms. Andrews. Plaintiff presented no facts disputing Pomona Valley’s proffered evidence.

Plaintiff argues on appeal that Pomona Valley could not rely on Dr. Goodman’s declaration to satisfy its burden on summary judgment because Dr. Goodman was not one of Ms. Andrews’s treating physicians and did not have personal knowledge regarding her care. To the extent Plaintiff is objecting to the admission of Dr. Goodman’s declaration, his objections are waived because he did not raise them below. (Code Civ. Proc., § 437c, subd. (b)(5) [“Evidentiary objections not made at the hearing shall be deemed waived”].) Plaintiff’s argument that Pomona Valley could not rely on an expert witness to review the medical records and render opinions regarding Ms. Andrews’s care and treatment lacks merit and is not supported by any apposite authority.

Plaintiff also argues that the trial court should have denied the summary judgment motion because Pomona Valley did not present admissible evidence contradicting the allegation in the first amended complaint that Pomona Valley permitted Ms. Andrews to lie in urine and feces. Pomona Valley presented evidence establishing that it continuously monitored Ms. Andrews, 24-hours-a-day, and provided appropriate care to her. After reviewing Ms. Andrews’s medical records from Pomona Valley, including the nursing notes, Dr. Goodman concluded that Ms. Andrews “was accordingly never neglected or abandoned by the staff at Pomona Valley Hospital Medical Center.” Pomona Valley met its burden on summary judgment by demonstrating that Plaintiff cannot establish a cause of action for elder abuse based on this allegation of neglect. There is no triable issue of material fact here because there is no evidence in the record that Pomona Valley neglected Ms. Andrews by allowing her to lie in urine and feces.

The allegation in Plaintiff's complaint is not evidence raising a triable issue of material fact.

Plaintiff further argues that the trial court should have denied the summary judgment motion because Pomona Valley acknowledged that it treated Ms. Andrews for ingrown toenails by having a podiatrist trim her toenails. There is no evidence in the record indicating that Pomona Valley neglected to provide appropriate care for Ms. Andrews's toenails. For example, there is no evidence that Pomona Valley ignored the condition or allowed the toenails to become infected. In fact, a podiatrist was brought in twice to care for Ms. Andrews's toenails. Based on his review of the medical records, Dr. Goodman concluded that Pomona Valley provided appropriate care in this regard. There is no triable issue of material fact here.

Finally, Plaintiff contends that the trial court erred in granting summary judgment because Pomona Valley's separate statement of undisputed material facts in support of the summary judgment motion is "severely defective." Plaintiff argues that Pomona Valley failed to separately identify and address the issues of duty and breach of duty in its separate statement. Pomona Valley moved for summary judgment on grounds that Plaintiff could not prove that it engaged in any conduct which violated the elder abuse statute. Pomona Valley identified this issue in its separate statement and set forth undisputed material facts demonstrating (1) that it did not neglect Ms. Andrews or engage in any negligent, reckless, oppressive or malicious conduct, (2) that it provided appropriate care to Ms. Andrews, and (3) that it did not do or fail to do anything which caused or contributed to any injury to Ms. Andrews. Thus, Pomona Valley set forth in its separate statement undisputed facts which negated elements of Plaintiff's cause of action, and established that Pomona Valley is entitled to judgment as a matter of law. Despite Plaintiff's assertion to the contrary, Pomona Valley cited to the evidence supporting each of its undisputed material facts.

For the foregoing reasons, the trial court properly granted Pomona Valley's summary judgment motion.

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover its costs on appeal.
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.